No. 12,722

United States Court of Appeals

For the Ninth Circuit

California Motor Transport Co., Ltd. (a corporation), et al.,

Appellants,

vs.

The Fidelity and Casualty Company of New York (a corporation),

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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BASIS OF JURISDICTION.

This action was brought by the Fidelity & Casualty Company of New York, a New York corporation, against defendants, California corporations and citizens, to collect insurance premiums in the amount of $7841.99. An answer was filed and also, with leave of Court, a third party complaint. By the third party complaint the defendants allege that if any liability exists to the plaintiff, it is due to wrongful acts and

negligence of Bayly, Martin & Fay, Inc., the insurance broker in the transaction.

The action was brought and tried in the United States District Court, for the Northern District of California, Southern Division. Judgment was rendered in favor of the plaintiff and third party defendant, and this appeal has been taken by the defendants. This Court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.

Defendants are highway carriers, jointly owned and operated. The complaint alleges that "on or about September 1, 1946 * * * plaintiff made, executed and issued to defendants * * * Comprehensive, General-Automobile Policy No. SPL-20968[1] (Tr. p. 4) and at the same time made, executed and issued to defendants Policy No. SPL-20950 covering excess insurance over that provided for in Policy No. SPL-20968. (Tr. p. 7.) There is no forthright allegation of acceptance of either of these policies. The action is for premiums upon these policies from September 1, 1946 to January 21, 1947.

The answer puts in issue the execution, issuance, delivery and acceptance of the policies and pleads affirmatively that a previous policy (SPL-1457) is-

[1]The initials SPL stand for Special Public Liability.

sued by plaintiff and covering defendants was in effect from September 1, 1945 to September 1, 1946; that prior to September 1, 1946, defendants received from third party defendant, their agent, a binder issued by plaintiff, which the agent informed defendants would constitute coverage at the same rate as in Policy SPL 1457, pending negotiations for new insurance; that Policy SPL 1457 required a monthly report of gross earnings and a payment of premium based thereon; that from and after September 1, 1946, defendants continued said monthly reports of gross earnings and remitted premiums at the rate specified in Policy SPL 1457; that plaintiff accepted said reports and payments without objection; that the coverage by plaintiff terminated January 21, 1947 and that the first knowledge defendants had of any demand for increased premium was in August, 1947.[2]

The third party complaint pleads in separate counts against the agent fraud, negligence and breach of duty. It alleges that cross-defendant misrepresented to the defendants that the old rate of insurance would be effective pending negotiations for new insurance; the receipt by the agent of Policies SPL 20968 and 20950, and failure to deliver same to defendants or inform defendants of their receipt or disclose their contents; concealment from defendants of the existence or acceptance of said policies, and conduct by

[2]August is an error. Bayly, Martin & Fay wrote a letter dated August 7, 1947, but did not deliver it until October 22, 1947, and until then defendants had no knowledge of the demand for additional premium. (Tr. pp. 255-274.)

which defendants were kept in ignorance of the existence of said policies and led to believe and act upon the assumption that during the entire period of September 1, 1946 to January 21, 1947, the effective rate was that specified in Policy SPL 1457.

As between plaintiff and defendants, appellants contend:

1. The evidence is wholly insufficient to prove that Policies SPL 20968 and 20950 were ever issued or accepted. The evidence discloses, without contradiction, that, during and as a part of negotiations carried on between the agent and plaintiff for new insurance for defendants, the policies were submitted by plaintiff to the agent in conjunction with a retrospective agreement, pursuant to which the rate of premium would fluctuate in accordance with loss experience of defendants. The policies and agreement together constituted the proposed insurance contract. The policies were not written or offered independently of the agreement or on the basis of a guaranteed rate of premium. The insured refused to consider a retrospective rating plan and never considered and never had the opportunity to consider the acceptance of the policies independently of such a plan. The contract that was proposed was never accepted and the policies never became effective.

2. That the conduct of the parties clearly demonstrates that the parties, plaintiff, defendants and cross-defendant, never considered or deemed these policies to be in effect.

3. That plaintiff, by its conduct, has waived and is estopped to assert any claim for additional premium.

As between defendants and third party defendant, appellants contend:

1. If Policies SPL 20968 and 20950 were ever accepted, it could only have been by wrongful and unauthorized acts of the agent.

2. If Policies SPL 20968 and 20950 were delivered to the agent and were in effect, the agent committed a breach of duty, statutory as well as common law, in holding the policies and failing to deliver them to the defendants.

3. Third party defendant by representation and conduct deliberately led defendants to believe during the entire period September 1, 1946 to January 21, 1947, and thereafter until October 22, 1947, that their insurance coverage was at the rate provided for in Policy SPL 1457, and that defendants had no additional liability.

SPECIFICATION OF ERRORS RELIED UPON.

1. The evidence is insufficient to support the finding (11) that on or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants its written contract of primary casualty insurance known as "Comprehensive General-Automobile" Policy No. SPL 20968.

2. The evidence is insufficient to support the finding (12) that on or about September 1, 1946, at the request of defendants and third party plaintiffs, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as "Comprehensive General-Automobile" Policy No. SPL-20950.

3. The evidence is insufficient to support the finding (13) that plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs.

4. The evidence is insufficient to support the finding (13) that defendants reported claims and law suits under said policies or remitted monthly premium payments under said policies or that the said payments were received by plaintiff on account of the total earned premiums under said policies, or subject to final audit at said rates.

5. Failure of the Court to find that said policies were submitted by plaintiff and handed by plaintiff to third party defendant, in conjunction with a retrospective agreement which was an integral part of the policies, and without the execution of which the policies would not be issued.

6. Failure of the Court to find that the retrospective agreement was never executed or accepted.

7. Failure of the Court to find that the said policies were retained by third party defendant, and never delivered to defendants, for the reason that they were never issued and never became effective.

8. Insufficiency of the evidence to establish that the policies, or either of them, was ever accepted.

9. Insufficiency of the evidence to support the finding (15) that defendants paid to plaintiff $9131.13, or any other sum, on account of earned premium of Policy SPL-20968.

10. Failure of the Court to find that plaintiff, by its conduct in knowingly accepting, without protest or objection, reports and payments based on the premium rate of the former Policy SPL-1427, has waived and is estopped to assert any claim for additional premium.

11. Failure of the Court to find upon the issue of waiver and estoppel of plaintiff, a defense affirmatively pleaded by defendants.

12. Failure of the Court to find that if these policies were accepted, they were accepted by the wrongful and unauthorized action of third party defendant.

13. Insufficiency of the evidence to support the finding (18) that third party defendant did not represent to defendants that a binder issued on or about August 7, 1946, covered defendants pending negotiations for new insurance.

14. Insufficiency of the evidence to support the finding (18) that third party defendant at no time made representations to defendants that were false and untrue, or that third party defendant had reasonable grounds for not believing true.

15. Insufficiency of the evidence to support the finding that third party defendant received and ac-

cepted the aforesaid policies from plaintiff with the knowledge of and in accordance with the instructions of defendants.

16. Insufficiency of the evidence to support the finding that third party defendant at no time concealed from and failed to notify defendants of the receipt of said policies from plaintiff.

17. Failure of the Court to find that third party defendant retained said policies and did not deliver or submit them to defendants until Oct. 22, 1947.

18. Failure of the Court to find that third party defendant from April 19, 1947, when a claim for premium under Policy SPL-20968 was first asserted by plaintiff, until Oct. 22, 1947, deliberately concealed from defendants the fact that plaintiff asserted a claim for premium under said policy.

ARGUMENT.

This action is for the recovery of premiums alleged to have been earned under and according to the terms of two insurance policies, Nos. SPL-20968 and SPL-20950. The policies are alleged to have been in effect from September 1, 1946, until January 21, 1947. If these policies were not in effect, then the cause of action alleged has not been proved.

Defendants had been insured by plaintiff for a number of years. Its policy for the year September 1, 1945 to September 1, 1946 was known as No. SPL-1457. The rate of premium upon this policy was

1.223% of the gross income, and under it defendants were required to submit monthly reports of gross income, make monthly remittances based thereon, and at the expiration of the policy submit their records of gross receipts for a final audit. Prior to its expiration, August 27, 1946, plaintiff issued a binder. (Exhibit B.) This binder was delivered by the broker, third party defendant, to defendants with a letter (Exhibit I) in which it is stated: *"This contract is your Comprehensive Public Liability and Automobile Damage Policy and the enclosed will act as evidence of insurance* PENDING RENEWAL." It is undisputed that Bayly, Martin & Fay, Inc. carried on negotiations with plaintiff endeavoring to agree on a basis of renewal and that these negotiations continued until January 17, 1947. It is undisputed that defendants were covered by insurance by plaintiff from September 1, 1946 until January 21, 1947, and that during that period defendants continued to report and pay premiums according to the terms and rate of Policy 1457, and that plaintiff accepted and retained these reports and payments without protest or objection.

The question in this case is not whether during September 1, 1946 and January 21, 1947, defendants were covered by a binder or whether they were covered by an oral extension of their former policy. The question is whether or not the two policies sued upon in this action were in effect. The length of time that negotiations for a new contract of insurance should be carried on was optional with both sides. Either could terminate the negotiations at will. A new con-

tract could only become effective by mutual agreement. Unless a new contract was entered into for a different rate, the coverage could only have been at the rate contained in the former policy. Plaintiff contends that from September 1, 1946 until January 21, 1947, these new contracts of insurance were in effect. Appellants maintain that the evidence does not support a finding that they were in effect.

It is unnecessary to cite authority to the point that the essentials of a contract of insurance are not different from those of any other contract. There must be a meeting of minds. The offer and acceptance must conform. The policy must be accepted on the same terms and conditions upon which it is offered or issued.

> "A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties agree upon the same thing in the same sense, and unless they do so agree there is no contract."
>
> *K. C. Working C. Co. v. Eureka-Sec. Ins. Co.*, 82 Cal. App. (2d) 120, 133;
>
> *American Can Co. v. The Agricultural Ins. Co.*, 12 Cal. App. 133, 137.

It has already been indicated that the rate of premium on Policy 1457 was $1.223 for $100.00 of gross receipts. It was a guaranteed or fixed rate of premium. The present action is based on the theory of a guaranteed or fixed rate of premium of $2.20 for each $100.00 of gross income. The increase is almost 100%.

POLICIES SPL 20968 AND 20950 WERE NEVER OFFERED EXCEPT IN CONJUNCTION AND COUPLED WITH A RETROSPECTIVE AGREEMENT, WHICH LATTER HAD TO BE ACCEPTED AND EXECUTED BEFORE THE POLICIES WOULD BECOME EFFECTIVE.

Appellants are urging, with the utmost seriousness, that the finding of the trial Court that the policies sued upon were in effect from September 1, 1946 to January 21, 1947, is not supported by the evidence. Being well aware of the rule that a judgment will not be disturbed if supported by substantial evidence, we shall endeavor to show that such evidence is lacking in this case. For this reason, we shall not dwell upon the testimony of appellants, but try to demonstrate out of the mouths of respondent's own witnesses and officials, and by their conduct, that these policies were not in effect. So far as appellants are concerned, their testimony is that they were told and understood that the binder would constitute their coverage pending negotiations for renewal and at the rate in the expiring policy (Tr. pp. 347, 403); that only the retrospective agreement was submitted to them; that they knew nothing of these policies (Tr. p. 405); that no flat or guaranteed rate was ever submitted (Tr. p. 406); that they refused to accept a retrospective plan of rating (Tr. pp. 404, 406); that they never accepted or authorized the acceptance of these policies (Tr. p. 406); that they never agreed to a 2.20 rate of premium (Tr. p. 407); that the first they knew of any demand for additional premium was on October 22, 1947. (Tr. p. 407.)

THE INSTRUMENTS.

Let us first look at the documents themselves. These policies are Exhibits 3 and 4. The retrospective agreement (Exhibit C) refers specifically to Policy SPL-20968 (the primary coverage) and states that it is about to be issued upon the security of the agreement. The language used is as follows:

> "WHEREAS, at the special instance and request of the INSURED and *upon the security of this Agreement,* the COMPANY is about to issue to the INSURED the following policy:
> Automobile Liability Policy Number SPL-20968
>
> WHEREAS, the COMPANY, for the mutual benefit of the COMPANY and the INSURED, has proposed the adoption, by agreement, of the Retrospective Rating Plan hereinafter set forth *in modification of the Premium provisions of the said policy, and such proposal having been accepted by the* INSURED,
>
> NOW, THEREFORE, in consideration of the premises and the sum of one dollar by each of the parties hereto, to the other, in hand paid, the receipt of which is hereby acknowledged, IT IS AGREED:"

Policy SPL-20950 (excess coverage) contains an endorsement (No. 8), which refers to and ties in the retrospective rating plan covered by the agreement. Explanatory of this endorsement, Charles A. Mettalia, casualty superintendent of plaintiff, testified as follows:

> "Q. The retrospective arrangement or plan mentioned here has reference to the retrospective

agreement which is dated September 1, 1946, the same date as the policy; that is true, isn't it?

A. Yes.

Q. Is it a fact that this endorsement, Retrospective Rating Plan, was upon this policy at the time you delivered it to Mr. Cantlen?

A. I assume that all these endorsements were attached to the policy.

* * * * * * *

Q. Now, Mr. Mettalia, I call your attention to this language of the retrospective agreement, which is Defendants' Exhibit C: 'Whereas at the special instance and request of the insured and upon the security of this agreement, the company is about to issue to the insured the following policy: Automobile Liability Policy No. SPL-20968'. This policy No. SPL20968 referred to in the retrospective agreement is the same policy numbered SPL20968 which is Plaintiff's Exhibit 3 in this case, is that correct?

A. I believe so." (Tr. pp. 124-125.)

The instruments show upon their face that they are parts of one transaction, that the policies were not issued independently or on a flat or guaranteed rate of premium, but only in conjunction with a retrospective rating plan covered by the agreement.

THE TESTIMONY DISCLOSES THAT THE POLICIES WERE ONLY OFFERED IN CONJUNCTION WITH THE RETROSPECTIVE AGREEMENT AND NOT ON A GUARANTEED BASIS.

Charles A. Mettalia is casualty superintendent of plaintiff. He delivered the two policies to Mr. Cant-

len of Bayly, Martin & Fay approximately October 1st or 2nd, 1946. He delivered to Mr. Cantlen the retrospective agreement at the same time he delivered the policies.

"Q. Approximately when were they delivered to Mr. Cantlen, according to your best recollection?

A. I would say one of the policies was—let me see; that is about October 1, approximately October 1, maybe October 2nd.

Q. Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not?

A. I believe so.

* * * * * * * *

Q. What did you say to Mr. Cantlen when you gave him this retrospective agreement at the same time that you gave him these policies?

A. That we wanted to accept the policies on—*we wanted that signed so that that would be part of the renewal policy.* A retrospective rate basis is more or less to the advantage of the insured by signing such an agreement. Of course it could be the other way, too.

Q. Could be the other way, too?

A. It is possible, yes.

Q. Isn't it a fact that you asked Mr. Cantlen at the same time to have the insured sign this agreement?

A. Yes.

Q. You did? Now, then, Mr. Mettalia, this retrospective agreement was never signed, was it?

A. That is correct.

Q. Did Mr. Cantlen tell you that he submitted the retrospective agreement to the client, the insured?

A. Yes.

Q. Did Mr. Cantlen tell you that the insured refused to sign the retrospective agreement?

A. Yes.

Q. Was it after the insured refused to sign the retrospective agreement that the insurance was cancelled by the Fidelity & Casualty Company?

A. Yes." (Tr. pp. 106-109.)

When it became evident to Mr. Cantlen that California Motor would not accept a retrospective plan of insurance, he endeavored to have the plaintiff write the insurance on a guaranteed basis. The following testimony of Mr. Mettalia shows clearly that these policies were never written or offered except in conjunction with the retrospective agreement:

"Q. Did Mr. Cantlen ever tell you that he had not delivered either policy to the insured?

A. Several months later.

Q. When did Mr. Cantlen tell you first, for the first time, he had never delivered either one of those policies to the insured?

A. I don't recall ever hearing that statement from Mr. Cantlen.

Q. You said it was told you several months later. Who told you?

A. Several months later when we demanded the retrospective rating agreement to be signed, Mr. Cantlen said that the insured was not in agreement with the—that is, wasn't willing to

sign the agreement, and whether or not we could work up or revise or write up a new program, something like that. I don't recall the exact words.

Q. To get this clear, when you say 'a few months later' you mean after September 1, 1946?

A. Oh, yes, possibly November.

Q. You demanded of Mr. Cantlen the signing of the retrospective agreement?

A. Yes.

Q. That is correct?

A. That is correct.

Q. And Mr. Cantlen then told you he couldn't get the retrospective agreement signed, is that true?

A. That is correct.

Q. What did you mean when you said you learned a few months later Mr. Cantlen had not delivered the policies to the insured?

A. I repeat what I just mentioned a few minutes ago, that several months later Mr. Cantlen, when I approached him on signing the agreement, said that the insured would not sign the agreement, that he felt the rate was too high, something like that, and *whether or not we could work up a program on a guaranteed cost basis.*

Q. What did you tell Mr. Cantlen then? That you could not?

A. *That I would try to work up some guaranteed cost basis, but certainly under no conditions would the rate of $2 be acceptable as the guaranteed cost policy,* bearing in mind that there was a percentage of increase from the entire industry that is the automobile business in this State, of approximately thirty-three per cent, and that

if it did go on a guaranteed basis it would be in excess of $2.

* * * * * * *

Q. Mr. Cantlen told you the insured would not agree to that, didn't he?

A. That is correct.

Q. Mr. Cantlen told you that the rate was too high, that the insured would not accept such rate, is that it?

A. That is right. He was referring to the maximum.

Q. Then he asked you if you could negotiate and get something that might be acceptable to the insured?

A. That is correct.

Q. Did you have anything else to offer Mr. Cantlen, any different rate than had been submitted?

A. I don't recall, no. We were going to negotiate with the home office, and finally they decided to send out cancellation notices.

* * * * * * *

Q. From the time of your original negotiations with Mr. Cantlen in the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjusted according to the loss experience of the insured?

A. That is correct.

Q. And your conversations with Mr. Cantlen during the month of August, then, and at all times, were based upon a premium that would be ultimately figured upon a rate that would ultimately be determined according to the loss experience of the insured?

A. Correct, providing the insured did agree to it, or providing he would go along on the retrospective agreement." (Tr. pp. 126-130.)

The $2.00 rate, which Mr. Mettalia stated was definitely unacceptable to the company on a guaranteed basis is the rate called for by Policy No. SPL 20968. The guaranteed rate of $2.00 was both unacceptable to plaintiff and unacceptable to defendants. No acceptance of such a rate was ever communicated to plaintiff.

Mr. Cantlen.

"Q. Did you ever tell Mr. Mettalia or Mr. O'Malley that California Transport Company would accept policies with a 2.20 rate?
A. No, I did not." (Tr. p. 273.)

Without either offer or acceptance both essential elements of a contract are lacking.

The retrospective agreement was drawn by the New York office, the home office of plaintiff, and had already been signed by a vice president when the policies and agreement were handed to Mr. Cantlen. Its execution was not discretionary with the local office; the agreement was a definite requirement of the officials and home office of the company. (Tr. p. 145.)

Mr. C. L. Anderson is resident manager of plaintiff. Exhibit RR (Tr. p. 332) is a letter written by Mr. Anderson to Bayly, Martin & Fay. This letter definitely and unequivocally confirms the fact that plaintiff was only willing to renew the insurance sub-

ject to the retrospective rating plan covered by the agreement. It is dated December 11, 1946. It shows that the retrospective agreement was then, and had been, adamantly insisted upon as a condition precedent to renewal of the insurance. The renewal could not be accomplished without execution of the retrospective agreement and the closing words are: "It is necessary for us to put a time limit within which the matter of *renewal,* etc. *must be consummated.*"

It is difficult to imagine a stronger or more conclusive statement. Just eight days later, December 19, 1946, the time limit for renewal was set, and on that date notice was given to defendant of cancellation of coverage as of January 21, 1947. (Tr. pp. 92-93.)

On December 19, 1946, the same date that notice of cancellation was sent to defendant, Mr. Mettalia sent a telegram (Plaintiff's Exhibit 8, Tr. p. 109) to the home office of the plaintiff in which it is stated: "California Motor Transport SPL-20950 and 20968. Request home office send cancellation notice to ICC effective January 21 Stop Insured refused to sign retrospective agreement."[3]

Henry R. Cantlen is vice president in charge of the San Francisco office of Bayly, Martin & Fay. He personally carried on negotiations with the plaintiff

[3]We shall later in this brief demonstrate that the reference to these policy numbers was not a reference to these particular policies, but only a convenient means of referring to pending coverage, so that when and if new insurance was issued the policies would be given those numbers and new filings with the Regulatory Body would not be required.

concerning renewal of the insurance. His testimony likewise demonstrates that the policies were never offered and were never open to acceptance other than in conjunction with the execution of the retrospective agreement.

"Q. When was the definite information conveyed to you by Fidelity, that Fidelity would only consider renewal of the insurance policy on a retrospective arrangement?

A. They told me at a meeting that took place about the middle of August—August 15th they indicated that definitely—not definitely, but that the home office were insisting upon the renewal of this contract on a retrospective basis.

Q. Did you thereafter see Mr. Coughlin?

A. Yes, I did.

Q. How long after August 15th, according to your best recollection?

A. According to my file, it was about August 27th.

Q. At that meeting at which you saw Mr. Coughlin, did you express to Mr. Coughlin the significance of a retrospective arrangement, what such an arrangement would entail and mean?

A. Yes, I did, sir.

Q. Did you tell him at that meeting that Fidelity was insisting upon renewal of the insurance upon a retrospective arrangement?

A. Yes, I did.

Q. I understood you to say he expressed himself as not being pleased with the idea of a retrospective arrangement.

A. He did.

Q. Thereafter you took the matter up with Mr. Mettalia and Mr. O'Malley again, both told you that the company was adamant and that the home office would only consider the business on the basis of a retrospective plan, is that true?

A. That is true.

Q. Approximately when was it that Mr. Mettalia or Mr. O'Malley gave you that information?

A. The *ultimatum, definite ultimatum,* came just prior to the time that the policies were issued, so that would have been in the neighborhood of September 22nd or 23rd." (Tr. pp. 262-263.) (See also Tr. pp. 239, 243-244.)

As further evidence that the policies were not issued or accepted is the fact that Cantlen not only continued negotiations with plaintiff in an endeavor to have the insurance renewed on an acceptable guaranteed basis, but also continued negotiations with other companies. (Tr. pp. 242-243.)

After receiving the policies and retrospective agreement, Cantlen did not show the policies to defendant, but only submitted the retrospective agreement. This was in October, 1946.

"Q. So you told him the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?

A. Correct.

Q. What happened after that?

A. I again went over the workings of the retrospective plan and left the retrospective agreement with him, and he said he wanted to look

them over and would probably have his attorney look them over, but he again reiterated that he would not be wholly satisfied with such a plan, and asked me if I couldn't interest a market, so I told him we were scouring the market to obtain a company *that would write the business on a guaranteed plan in lieu of a retrospective writing plan.*

* * * * * * *

Q. This was in October, was it, or the latter part of September?

A. No, this would have been in October." (Tr. pp. 244-245.)

When asked by counsel for plaintiff if he noticed that the policies set up the 2.20 rate, Mr. Cantlen replied:

"Yes, they set up those rates, but they are issued in conjunction with another agreement".

"Q. I would like to have you take Policy No. 20968, which is the primary policy, Plaintiff's Exhibit 3, and point out to the Court, where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here *because the policies were definitely issued with the understanding that the retrospective agreement would be entered into.*" (Tr. p. 295.)

The record in this case is so replete with testimony demonstrating without any question that these policies were only to be effective on execution of the retrospective agreement, that it is difficult to keep the quotations within reasonable bounds. The following

is most important: Bayly, Martin & Fay, although it received the policies and the retrospective agreement simultaneously, delivered the retrospctive agreement to defendant for examination as soon as received, the beginning of October, 1946, but retained the policies in its possession until October 22, *1947*. Mr. Cantlen was asked why the policies were not delivered before October 22, 1947, and his answer could not be more to the point.

> "Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22, 1947?
>
> A. *The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was not signed, so therefore,* IN OUR OPINION, THE TRANSACTION WASN'T COMPLETED." (Tr. p. 273.)

Also on examination by his own counsel, Mr. Cantlen testified (Tr. p. 339):

> "Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn't deliver the policy to Mr. Coughlin when you received it in October, 1946?
>
> A. *I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned."*

What stronger or more definite statement could be made?

Also, we respectfully call attention to the following testimony of Mr. Cantlen. Bayly, Martin & Fay had received from defendants the premium for the month of September, 1946, in November, 1946, but did not turn it over to plaintiff until January, 1947. Counsel for Bayly, Martin & Fay asked for an explanation for this delay in remittance and Cantlen replied:

> "Yes, I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up *because the transaction had not been completed, as far as we were concerned;* THERE WAS NO AGREEMENT; *the assured had not consented or agreed to the retrospective basis on which the company was insisting;* and *so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.*" (Tr. pp. 338-339.)

This was in November, 1946. How, in the face of such testimony, is it possible to conclude that there was an agreement, and particularly an agreement that the policies were issued and accepted on a guaranteed basis?

We believe that the testimony of both Mr. Mettalia and Mr. Cantlen establishes beyond any question that the policies were never offered for acceptance, except in conjunction with the acceptance of a retrospective rating plan, which defendant at all times refused to consider. We shall now attempt to demonstrate that

neither the insurer nor the broker considered these policies in effect and that the idea of attempting to base a claim upon them for additional premium was first conceived by Fidelity in the month of April, 1947.

THE CONDUCT OF THE PARTIES DEMONSTRATES THAT THESE POLICIES WERE NOT CONSIDERED IN EFFECT.

Policies 20968 and 20950 call for payment of substantial deposit premiums. Deposit premiums had been required by all of the several policies that plaintiff had previously written for the defendant. In all prior instances the deposit premiums had been demanded and paid at the time the policies were issued. In this instance, the deposit premiums were never billed by the plaintiff, were never asked for by the plaintiff, and were never billed or asked for by the broker.

Mr. Rechnagel, cashier of the plaintiff, stated that if a policy calls for a deposit premium, it is the business of his department to bill and collect it; that he had no record of any bill having been sent for the deposit premiums on these policies and that according to general practice it should have been billed. (Tr. pp. 188-191.)

If these policies were considered in effect, it seems strange that the general practice of the company should not have been followed. The deposit premium on Policy 20968 alone was $6060.00, and on 20950 it

was $6685.40. It unquestionably should and would have been billed and collected if the policies had actually been issued.

> "Q. When you say it should have been billed, you mean according to the general practice of your company when a policy is issued which calls for a deposit premium, that it is the practice and the duty of your office to bill for that deposit premium?
>
> A. That is right." (Tr. p. 190.)

Policy 1457 required defendant to make monthly reports of gross receipts and remit premiums based thereon at the rate of 1.223%. For the period from September 1, 1946 until January 21, 1947, defendant continued to send to Bayly, Martin & Fay its monthly reports of gross receipts and remit premiums based thereon at the same rate, 1.223. Bayly, Martin & Fay in turn and according to regular practice processed the reports made by defendant and refigured the premium, breaking it down into public liability at the rate of .997 and property damage at .226 (total 1.223). (Tr. pp. 252, 289.) These reports and checks of Bayly, Martin & Fay to cover at said rates, were sent by Bayly, Martin & Fay to Fidelity.

The auditing department of Fidelity received and checked the reports of Bayly, Martin & Fay and endorsed approval thereon. (See Exhibit 10.) The auditing department of Fidelity in turn made out its own written reports showing premium earned at the same rate (1.223) shown in the reports of Bayly, Martin & Fay. (Exhibit 11.) (Tr. pp. 167, 172.) This procedure

was followed in the case of each month's gross receipts. When the checking was done and the auditor's reports made out, the auditor's office had in its possession dailies or copies of these policies.

Copies of these auditor's reports (Exhibit 11) went to the cashier of Fidelity and also Bayly, Martin & Fay. The cashier had in his possession the dailies of Policies SPL 20968 and 20950 since early October, 1946. (Tr. p. 194.) The checks of Bayly, Martin & Fay covering the premium figured on the basis of 1.223, were received by the cashier and deposited. No protest, question or objection was raised by Fidelity or Bayly, Martin & Fay. (Tr. pp. 289, 290.) It was not until April 19, 1947, that a claim was asserted by Fidelity for additional premium. This was the first time that Cantlen ever heard of such a claim. (Tr. p. 275.)

The conduct of Fidelity in accepting and checking reports of earned premium at the rate of approximately one-half of that now asserted; actually making out its own reports upon such basis; accepting and retaining without protest or objection payments made upon said basis, is wholly irreconcilable with the theory of plaintiff's case. Likewise, is the conduct of Bayly, Martin & Fay. This insurance coverage had been the subject of extensive negotiations locally and with the home office, and it is just incredible that either Fidelity or Bayly, Martin & Fay could have acted as they did, if the understanding or intent had been that the policies sued upon were effective.

It is the practice of the cashier's office of Fidelity to make out ledger cards covering policies, as soon as issued. (Tr. pp. 191, 195.) Mr. Rechnagel, cashier of plaintiff, at the request of plaintiff's counsel, produced ledger cards dated February 15, 1947 (five and one-half months after it is contended these policies became effective). (Tr. p. 191.) These cards are part of Exhibit 14. They show that the rate of premium on Policies SPL 20968 and 20950 is not 2.20, but *1.223*. It was not until May 1, 1947 (shortly after the plan to assert a claim for additional premium was first formulated) that new ledger cards (cards 5 and 6) were made out and upon which the premium rates contained in Policies 20968 and 20950 were used, as if they were guaranteed rates and entirely disconnected with a retrospective rating plan. (Tr. p. 195.) Again, conduct of plaintiff that cannot be explained and wholly inconsistent with its claim.

Under date of November 1, 1946, ledger cards (Exhibit H) were made (only produced at the demand of the plaintiff's counsel) purporting to show deposit premiums called for by Policies 20968 and 20950. In some strange manner, that the cashier could not explain, an entirely different deposit premium was shown than set forth in the policies. (Tr. p. 217.) It was admitted that no deposit premium had ever been billed or collected, although it was the practice to bill and collect deposit premiums as soon as policies became effective. (Tr. p. 190.) The cards were made out and held in abeyance until the policies should become

effective by acceptance and execution of the retrospective agreement; events that never occurred.

In the case of all policies calling for a premium based on gross receipts of the insured, it is customary for insurer to make a final audit to determine that full and accurate reports of gross receipts have been submitted. (Tr. p. 298.) The final audit by Fidelity of defendants' gross receipts for the period September 1, 1946 to January 21, 1947, was made by plaintiff's auditing department April 2, 1947. (Tr. p. 153.) It was not until after this final audit that plaintiff or any department of plaintiff ever considered making a charge under these policies. It was then, for the first time, that there was written on the auditor's report (Exhibit 12) and in handwriting not identified the words: "Assured refused to sign retrospective agreement, retrospective rate not to be used." (Tr. p. 179.) The notation assumes that because the assured had refused to sign the retrospective agreement, execution of which had been demanded, the company could simply disregard that part of its offer, and collect from the assured on the theory and basis that the company had offered and the assured had accepted the policies on a guaranteed basis.

Based upon the final audit, audit statements, dated April 19, 1947 (Exhibit 13, Tr. p. 158), were made out by plaintiff's auditing department, showing additional premium due and copies of this statement were sent to plaintiff's cashier and to Bayly, Martin & Fay. No copy was sent to defendants. There is attached to Ex-

hibit 13 a statement made out by Bayly, Martin & Fay to California Motors for the additional premium. The statement is an original, and was never sent to California Motors. (Tr. pp. 160, 255.)

When Bayly, Martin & Fay received a copy of the statement (Exhibit 13) it not only did not send a copy to or notify the defendants, but disputed and contended with Fidelity that it had no right to demand further premium.

Mr. Cantlen.

"Q. After you received this statement of April 19, 1947, did you take the matter up with Fidelity & Casualty Company?

A. Yes.

Q. With whom did you take it up?

A. I took it up with, first Mr. Mettalia.

Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premium?

A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned premium developed, or, in the gross receipts report.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive, in other words, *they were charging this earned premium on a guaranteed basis,* and that I could not—*the assured never agreed to pay 2.20 on a guaranteed basis,* and I felt that the rate was excessive on the guaranteed basis. Mr. Mettalia contended that the company *would not have issued the policy at the lower rate on a guaranteed basis,*

and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of 2.20.

Q. Did you thereafter take the matter up with any one of the company, other than Mr. Mettalia?

A. Yes.

Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and *I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on a retrospective basis.*" (Tr. pp. 276-277.)

We emphasize the significance of these statements. Defendants never agreed to pay 2.20 on a guaranteed basis. Cantlen never recommended or suggested such a rate. Mettalia did not contend that the policies were in effect or that they were issued on a guaranteed basis, but sought to justify the demand on the ground that *if* the company had issued policies on a guaranteed basis it would have insisted on a 2.20 rate. Mr. Cantlen's testimony and his recollection of the conversations and statements made by Mr. Mettalia have not been disputed.

It was not until August 6, 1947, that Bayly, Martin & Fay made a bill to defendants for the additional premium demanded by plaintiff. This bill, however, was not sent to defendants. It was held until October 22, 1947. (Tr. pp. 254-255, 277.) At that time Cantlen went out to defendants' place of business and brought with him the two policies, which Bayly, Martin & Fay had retained in its possession all this time and a bill

for the additional premium. Cantlen did not tell defendants to pay the bill, but on the contrary brought with him a form of letter for defendants to write to Bayly, Martin & Fay disputing the charge. Defendants followed Cantlen's instructions and wrote the letter he dictated. This letter is Exhibit 18. (Tr. pp. 277-279.)

Mr. Cantlen was examined pertaining to statements in this letter, of which he was the author, and the following are excerpts from his testimony (Tr. pp. 278-279):

> "Q. I call your attention to this paragraph: 'During the aforementioned period, namely, from September 1, 1946 to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity & Casualty Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company.' Is that statement true?
>
> A. Yes.
>
> Q. I call your attention to this statement: 'At no time did we agree to a rate of $2.20 as against our former rate of $1.223.' Did you draft that statement?
>
> A. Yes."

It is respectfully submitted that the oral testimony introduced in this case, the documentary evidence and the conduct of the parties clearly demonstrate,

1. These policies were never in effect;

2. They were offered only in conjunction with the retrospective agreement;

3. The insurance was never offered on a 2.20 guaranteed basis and appellant never agreed to pay a 2.20 rate of premium;

4. The arrangement between the parties was that pending negotiations for renewal appellant should be covered at the rates provided for in Policy 1457;

5. No other rates were ever agreed upon.

THE FILINGS WITH THE INTERSTATE COMMERCE COMMISSION AND RAILROAD COMMISSION.

The argument is made, and mention is made in the Memorandum Opinion of the Trial Court, that these policies were in effect, or regarded as in effect, because the number of the primary Policy, SPL20968, was listed with the Interstate Commerce Commission and Public Utilities Commission. The testimony demonstrates that these listings have no significance whatsoever.

It will first be noted that the listing of this policy number occurred on August 27, 1946. (Tr. pp. 84-87.) It was done at the same time that Fidelity issued its binder covering appellant, pending renewal. At the time of these listings negotiations had hardly begun, no policies had been written, and no one had the slightest knowledge whether policies would ever be written.

These are the simple facts: Appellant is a highway carrier and is required to have information of in-

surance coverage on file with these Regulatory Bodies. When a binder is issued, constituting temporary coverage pending negotiations for issuance of a policy, the practice of the insurance carrier is not to file the details of the binder with the Regulatory Bodies, but to assign a policy number, which will become the number of the new prospective policy, if and when issued. The policy number, so assigned, is listed. This satisfies the requirements of the ICC and Public Utilities Commission and obviates the necessity of re-registering when the renewal policy is issued. The insurance is referred to by a policy number, although there is no policy bearing such a number and the coverage is actually by a binder. It is merely a convenient method of listing and identifying the coverage. The listings having been by a policy number, when the coverage is cancelled, the notice of cancellation naturally refers to the insurance in the same manner in which it was listed, to-wit, by policy number.

The following was testified to by Mettalia.

Direct Examination.

"Q. Now, at the time you issued the binder were there any numbers assigned to the *prospective* new policies?

A. Yes, we had to assign a number to the policy because—to the insured, because of certain federal and state filings we had to make.

Q. What were those filings to be?

A. We had to make a Railroad Commission filing, which is now known as the Public Utilities Commission, and also had to make a filing for the

ICC, because they would immediately stop the operations of the California Motors.

Q. So at the time the binder was issued, following this conversation with Mr. Cantlen and prior to the approval by the Bureau, you did assign policy numbers to these prospective contracts and made the filings with the Railroad Commission and the ICC?

A. Because the binder wouldn't be very much value to an insured without these filings.

Q. By the way, Mr. Mettalia, the filings with the Railroad Commission and the ICC were only as to the primary insurance, isn't that correct?

A. Yes, because that is all they require.

Q. At this time I show you what purports to be a copy of the filing with the Railroad Commission and ask you if it is—if you identify it as such?

A. That is correct.

Q. I notice it carries the stamp of the 'Railroad Commission, State of California August 28, 1946, Transportation Department'. Does that recall to you on or about the date it was filed?

A. Yes, this was filed with the Railroad Commission on August 27, which is the date there, and it was accepted by the Railroad Commission on August 28.

Q. That was before the expiration date?

A. That is correct.

Q. On the then existing Policy SPL-1457?

A. That is correct." (Tr. pp. 84-85.)

Cross-examination.

"Q. Regarding these filings, these filings were filed about August 27, 1946, were they not?

A. That is correct, they were.

Q. They were filed at a time when the binder had been issued to the insured extending 1457, is that correct?

A. Yes. Can I add a little to that?

Q. Yes.

A. *When binders are issued we automatically add these assigned policy numbers to satisfy the ICC and the Railroad Commission.* They do not accept them otherwise. If it isn't satisfactory to the ICC file, they are fined $30 gross on that particular file." (Tr. pp. 119-120.)

Mr. Cantlen also testified "It was the customary procedure." (Tr. p. 242.)

From and after August 27, 1946, it was the practice of Fidelity and Bayly, Martin & Fay to refer to the coverage of defendant in the same manner, SPL-20968.

"Q. (Mr. Cantlen). No rate or terms had been agreed upon for that policy?

A. No.

Q. After August 27, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage referred to and identified in the same manner as Policy 20968?

A. My recollection, it was.

Q. It was so referred to?

A. Yes." (Tr. pp. 299-300.)

It is respectfully submitted that the listing of Policy SPL-20968 in August, 1946, and permitting the listing so made to remain until January 21, 1947, do not in the slightest manner or degree indicate that any policy bearing that number was ever actually issued or accepted.

THE BINDER.

Under the date of August 27, 1946, Fidelity issued to defendants a binder. This binder is Exhibit B. (Tr. p. 106.) The binder covers exactly the same risks as were covered by Policy SPL-1457 and recites under "Description of Risk" the following: "Pending renewal of Policy No. SPL-1457." A heading "Estimated Premium" is left blank. The covering note is entitled "Sixty Day Binder No. 126895." The binder states that if the policy is issued, the policy shall supersede the binder and the policy begin on the binder date. If the policy is not issued, the binder may run for allotted term or be cancelled by notice. The following provision of the binder has no application in this case: "A premium charge at the rates and in compliance with the rules of the manual of rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured." The coverage in this case is a specially negotiated risk and has nothing to do with the manual of rates. (Tr. pp. 270-271.)

Mr. Cantlen delivered this binder to defendant in conjunction with a letter, which is Exhibit I. (Tr. p. 265.) This letter advises defendant that the binder will constitute the coverage pending negotiations for renewal.

That it was the intent that the binder should constitute the coverage pending renewal is indicated by the following testimony of Mr. Cantlen:

> "(Mr. Murman). Q. What did you tell Mr. Mettalia about the insurance when you stated that he said the home office was adamant, that there must be a retrospective plan?
>
> A. I told him that the assured was adverse to that form of plan and that we were still trying to get together rather—this was the latter part of August I told him that the assured disliked the idea of a retrospective plan, in view of the possible penalty, and that we were still trying to get the thing worked out and have a meeting, or have them get together, and he gave me a binder *pending renewal.*
>
> Q. That is Defendants' Exhibit B?
>
> A. Yes.
>
> Q. What, if anything, was said about the filings?
>
> A. And that they would file so that there would be no lapse of coverage." (Tr. pp. 239-240).

Mr. Cantlen also gave the following testimony (Tr. pp. 264-266):

> "Q. At what meeting was it that Mr. Mettalia told you that Fidelity would give you a binder

pending renewal and would file with the ICC and Railroad Commission?

A. To my recollection, that was at a meeting of August 15th.

Q. As nearly as you can recall, were those the words of Mr. Mettalia?

A. I can't recall his exact words, but it is customary in our business that we have extension of coverage pending a renewal, so I undoubtedly requested he issue a binder *pending renewal of the policy* and do the necessary filings with the Commissions."

* * * * * * *

"Q. Now at the time you received the binder and delivered it to Mr. Coughlin, did you know how long the negotiations for renewal would take?

A. No, I didn't.

* * * * * * *

Q. The negotiations for the renewal of the policy took a great deal more than sixty days, did they not?

A. Yes."

Over thirty days had expired before the retrospective agreement and policies were received. It was November, after the expiration of the sixty days, according to Mettalia, when Cantlen told him that Coughlin would not sign the retrospective agreement and asked Mettalia to try to work out something on a guaranteed basis. (Tr. p. 127.)

Negotiations continued until cancellation. (Tr. pp. 290-291.) Until that time, Cantlen was endeavoring

to persuade Coughlin to enter into the retrospective agreement. (Tr. p. 332.)

The custom of insurers to issue binders or covering notes "pending renewal" is well established. If no premium is specified it is presumed that the coverage is on the same terms as the policy in force. This is clearly expressed by the District Court of Appeal of California (hearing by Supreme Court denied) in the case of *Globe & Rutgers v. Liberty Bell Insurance Co.,* 16 Cal. App. (2d) 76, 79-80. In that case, as in the case at bar, the binder was for sixty days—*pending renewal.* The Court said:

> "A covering note is a contract of present insurance. * * * Appellants contend that there was no consideration for this 'keep covered' contract. The law seems to be well settled that a 'binder' contract or 'keep covered' contract need not express any consideration, there being an implied agreement to pay the usual premium. (Couch on Insurance, sec. 91.) Temporary contracts of this sort are frequently construed by the courts as implying the customary rates, even when no premium is specified in the 'covering note' or 'binding slip'. (*Law v. Northern Assur. Co.,* supra, at p. 403; *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.,* 68 N.J.L. 674 (54 Atl. 458).) It was stipulated that the custom and procedure on the Pacific Coast, in matters of this kind, is that the reinsured company, prior to the expiration of a policy which it anticipates may be renewed, takes the reinsurance certificate to the reinsurer, and requests that the protection and coverage of such reinsurance be extended for a

period of time, so as to enable the reinsured to obtain the renewal of its policy, and such reinsurance certificates as it may desire for the ensuing year. If the reinsurer is agreeable to reinsuring the line and wishes to grant such extension, it marks on said reinsurance certificate the words 'Kept Covered.....days from expiration pending renewal'; *the purpose of such 'keep covered' note being to provide automatic cover for the reinsured under the same terms of the policy in force, pending such time as it is definitely known whether or not such policy will be renewed and the reinsurance offered under the terms of the 'keep covered' note required.*"

Negotiations for renewal continued beyond the sixty days. Nothing further was said or done pertaining to the binder. According to both Mettalia and Cantlen the binder was not formally extended, nor was it cancelled. However, Fidelity threatened cancellation of the coverage unless there was acceptance of the retrospective agreement, and on December 19, 1946 actual notice of cancellation of coverage was given. The sixty days expired October 30, 1946. Thereafter, and until cancellation was effective, the conduct and practices of insurer and insured, reporting, paying and receiving, continued exactly as during the preceding sixty days.

There can be no question but that the binder constituted the contract of insurance for the sixty days for which it was originally written, and that the rate was that of the expiring policy. It is likewise clear

from the testimony and conduct of the parties that after the expiration of the sixty days, continuation of coverage under the former policy was either agreed upon by parol or was implied. An extension by either method is valid, and unless different terms are agreed upon it will be presumed that the terms of the expiring policy will be applicable.

14 *Cal. Jur.* 428;
Gold v. Sun Insurance Co., 73 Cal. 216, 218;
Globe & Rutgers v. Liberty Bell Ins. Co., 16 Cal. App. (2d) 76, 79-80;
Mallette v. British American Assurance Co. (Md.), 46 Atl. 1005;
U. S. Fire Insurance Co. of New York v. Fife, 6 S.W. (2d) 211, 214;
15 *A.L.R.* 1016, 1017 (Anno.);
69 *A.L.R.* 572, 573 (Anno.);
92 *A.L.R.* 239 (Anno.).

Let us emphasize that the issue in this case is whether or not these policies (SPL 20968 and 20950) were in effect and binding contracts between September 1, 1946 and January 21, 1947. The action of plaintiff is based upon them. It is alleged and found that these policies constituted the contracts of insurance binding on the insurer and insured from September 1, 1946 until January 21, 1947. If the insurance was under other contract or contracts, whatever their nature or legal basis, the plaintiff is not entitled to recover.

THE SIGNATURE OF MR. DAVIS UPON THE FINAL AUDIT.

C. A. Challburg testified that he went to defendant's place of business on April 2, 1947 to make a final audit. A final audit is made as a matter of course, when insurance is based on gross receipts, to ascertain if receipts reported were accurate. Mr. Challburg testified:

> "Q. Was the purpose of your visit to the office of the California Motor Transport Company to check the gross receipts of the California Motor Transport Company from September 1, 1946 until January 21, 1947?
>
> A. Right.
>
> Q. You went down to ascertain whether or not the gross receipts as reported by Bayly, Martin & Fay to Fidelity and Casualty Company, as shown upon Plaintiff's Exhibit 10, were correct?
>
> A. Right." (Tr. p. 170.)

Mr. Challburg testified that Mr. Davis, the auditor of California Motor, was present when he made the audit. The audit is Exhibit 12. The second page contains the gross receipts and is signed by Mr. Davis. Upon the same sheet is the notation already referred to that the retrospective agreement not having been signed, the retrospective rates were not applicable. We wish to make clear that Davis' approval went exclusively to the figures showing gross receipts, and that the other notations were not upon the document when he appended his signature.

> "Q. Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?

A. That is all.

Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figures as correct?

A. Yes." (Tr. p. 171.)

MEMORANDUM OPINION OF THE TRIAL COURT.

We shall here only consider those portions of the opinion that bear upon the right of the plaintiff to recover.

The opinion correctly states that "the point to be determined as far as the plaintiff and defendants are concerned, is whether or not there was an effective issuance and delivery of the policies which made them binding upon plaintiff and defendants". The trial Court simply disregards all of the *undisputed* testimony and evidence that the policies were only written and submitted in conjunction with the retrospective agreement, that the agreement was not accepted, and that there never was any meeting of minds. The trial Court states "there is no doubt that the plaintiff considered them in effect." Assuming that plaintiff did consider them in effect (which the testimony and circumstances clearly disprove), this could not convert an offer that had never been accepted into a contract.

The Court makes no mention of the wholly inconsistent conduct of plaintiff, which has been heretofore set forth, except to state that "the fact that no deposit premium was paid and that plaintiff received premiums based on the old rate are not, under the circumstances, inconsistent with the fact that the policies were then in effect." It is difficult to understand what "circumstances" the Court has reference to. It would seem to require a lot of explanatory circumstances to remove these glaring inconsistencies.

The trial Court states that the fact that the policies were considered in effect by plaintiff is shown by the testimony of its officials. It is submitted that the testimony of the officials conclusively demonstrates that the policies were only written and submitted in conjunction with the retrospective agreement and were never offered or authorized to be offered on any other basis. It is stated that the fact that plaintiff considered the policies in effect is shown by the fact that it did not cancel the filings with the Railroad Commission of the State of California and Interstate Commerce Commission. The testimony of plaintiff's officials, and the undisputed fact, is, that the filings with the Commissions were simply of a policy number, which number would be given to any prospective renewal policy that would be issued, and which in the meantime would be a ready method of reference to the insured's coverage. The filings would only be cancelled when the coverage was cancelled. There is no connection between the failure of plaintiff to can-

cel the filings and the effectiveness of the policies. The coverage was cancelled and likewise the filings, when it became finally apparent that the parties could not get together on the renewal policy.

The trial Court also points to the fact that plaintiff defended claims, as evidence that it regarded the policies as in effect. Of course plaintiff defended claims. The defendants paid and the plaintiff accepted for the period from September 1, 1946 to January 21, 1947 premiums at the former rate. Plaintiff was paid and retained $9131.13.[4] For at least sixty days from September 1, 1946, the coverage was under the binder. The facts that insurance continued after the sixty days, that premiums continued to be paid and accepted and that claims continued to be accepted and defended, exactly as during the original binder period, do indicate that plaintiff regarded itself as an insurer, but not that it regarded itself as an insurer under these policies.

We submit that there is nothing in the record which supports the trial Court's statement that plaintiff "treated and intended the issuance and delivery of its insurance policies to defendant as effective and binding upon it, even though it had not received from defendants the retrospective agreement *which it was demanding.*" Just how plaintiff could demand the execution of the retrospective agreement as a part of the insurance contracts, and at the same time treat

[4]The losses paid by plaintiff for the same period September 1, 1946 to January 21, 1947, including expenses of litigation, amounted to $7800.00. (Tr. p. 126.)

and intend that the policies should be effective and binding without the execution of the agreement, is indeed difficult to understand. At no time did plaintiff recede from its demand, at no time did it agree to issue the policies on a guaranteed basis, and at no time did the home office of plaintiff authorize or sanction the issuance of the policies on such a basis. The undisputed testimony is that the policies would not be issued except on a retrospective basis, and that in no event would a guaranteed 2.20 rate be considered by the plaintiff.

The trial Court states that while Cantlen testified that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation. We have already quoted Cantlen's testimony—definitely to the point that the policies were not considered effective because they were not accepted on the conditions offered. We have also related the conduct of Cantlen. We have shown that he retained the policies; that he did not collect or demand the deposit premiums; that he accepted from defendant premiums at the rate of the expiring policy, broke the rate down, recalculated the amount due and reported and remitted to Fidelity the basis of the former policy; that when the auditor's statement of April 19, 1947 was received, Cantlen did not send same to or notify defendants, but argued with plaintiff and contended that there was no justification to make the additional charge, that it was excessive

and never agreed to; that it was not until October 22, 1947 that he brought out to defendants the policies and the bill of plaintiff rendered in July, 1947, and at the same time brought with him a draft of a letter to be written by defendants denying liability. The trial Court does not mention any of this conduct. It overlooks these most significant facts and points out that Cantlen received a claim from defendant and sent it to plaintiff with a covering memorandum referring to the policies by numbers. (Tr. p. 248.) The trial Court overlooks the fact that this reference to policy numbers, according to Cantlen's own testimony, had not the slightest significance, inasmuch as from August 27, 1946, when the binder was issued, the prospective policies were referred to by these numbers and that the temporary coverage in all intercommunications between Cantlen and Fidelity was referred to by these numbers. (Tr. pp. 299-300.) The trial Court also mentions that in November, 1946, Cantlen advised the American Manganese, a customer of plaintiff (defendant), by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of the policies. It was an ordinary occurrence for a customer to ask verification of the fact that defendants were covered by insurance. Such inquiries were addressed to defendants and as a matter of routine were referred to the broker for reply. The only purpose of Cantlen's letter was to give the assurance to the customer. There was present coverage, in which the customer was interested, and certainly it was un-

necessary and inappropriate for the broker to detail to the customer the pending argument over renewal rates. So far as defendants are concerned, Mr. Davis, the office manager, testified that the writing of such letters by the broker was a routine matter and when copies were received by defendants they were simply filed away by a secretary without his even seeing them. (Tr. pp. 378-380.) It is also mentioned that Cantlen sent to plaintiff voluntary audits with specific reference to these policies. These voluntary audits (Exhibit 10) were the gross receipts, as reported by defendants, and upon which Cantlen had calculated the earned premium at the combined rate of 1.223. This significant fact the Court does not mention. The reference to the policy numbers in these voluntary audits was nothing more than the accepted manner of identifying the coverage that existed since the issuance of the binder.

The trial Court states:

> 'It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants' agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed."

We have specifically referred to every item of evidence reviewed by the trial Court in its opinion. The trial Court recognizes that the execution of the retrospective agreement was demanded. There is not an

iota of testimony that the demand for execution of the agreement was ever withdrawn. The testimony is undisputed that Cantlen knew and plaintiff knew that defendants would not accept the retrospective agreement. There is not an iota of testimony that plaintiff ever offered these policies on a guaranteed basis or that Cantlen ever agreed to accept them or was ever authorized to accept them on a guaranteed basis. The testimony is the very opposite. How and when could these policies have become effective? Certainly, the trial Court does not indicate how or when this occurred and the record is barren of anything that supports the conclusion that it did occur.

THE ISSUE OF WAIVER AND ESTOPPEL.

The answer of defendant affirmatively pleads the defense of waiver and estoppel. (Tr. pp. 24-26.) It is alleged in part:

> "That the action of plaintiff in accepting the reports and premiums forwarded by defendants, clearly indicating, as aforesaid, the estimation of said premiums on the basis of the premium rates provided for in policy SPL 1457, led and induced defendants to believe that they continued to be protected under the terms of said policy SPL 1457 and to be liable for premiums at the rate provided for in said policy SPL 1457 during the period of the negotiations alleged in paragraph II above; that the action of plaintiff has estopped plaintiff from asserting at this time that any new premium rate or any premium rate other than

that provided in policy No. SPL 1457 was in effect and binding upon defendants during the period September 1, 1946 to January 21, 1947."

The conduct of plaintiff lulled defendants into permitting the status to remain and the negotiations to continue. Defendants would never have agreed to pay a 2.20 rate and the negotiations would have promptly terminated if the claim for such a rate had been known.

Bayly, Martin & Fay was the broker for defendants and constituted their agent to place the insurance. However, Bayly, Martin & Fay acted as the agent of plaintiff for the collection of premiums, and the acts of Bayly, Martin & Fay in accepting from defendants the reports and remittances for premiums were the acts of the plaintiff. Mr. Rechnagel testified (Tr. p. 189):

"Q. Is the broker authorized by the company, your company, to make the collections in its behalf and then remit to the company?

A. The broker is authorized.

Q. The broker makes the collection on your behalf?

A. That is right."

* * * * * * *

"Mr. Cantlen

Q. Was it the arrangement between Bayly, Martin & Fay and Fidelity & Casualty Company that Bayly, Martin & Fay should collect the premium from the California Motor Transport

Company and remit it to the Fidelity & Casualty Company?

A. That is correct." (Tr. p. 285.)

It is the general rule that an insurance broker acts for the insured for the purpose of making the application and procuring the policy, and for the insurer for the purpose of collecting and delivery the policy.

2 Couch, Sec. 452, 1297;

Globe & R. F. Ins. Co. v. Lerher W. & Co., 215 N.Y.S. 225;

Newark Fire Ins. Co. v. Sammons, 110 Ill. 166.

The evidence is without contradiction that reports were regularly made and premiums regularly paid to Bayly, Martin & Fay and accepted by Bayly, Martin & Fay at the prior rate. (Tr. pp. 281-284.) The insured was thereby induced to rely upon the correctness of its remittances and not to place the insurance elsewhere. Upon general principles of waiver and estoppel such acceptance without protest or objection bars the right of any further demand.

American Eagle Fire Ins. Co. v. McKinnon (Ariz.), 286 Pac. 183;

Arendt v. North American Life Ins. Co. (Neb.), 187 N.W. 65.

The trial Court failed to find upon this issue of waiver and estoppel. This was a material issue and the failure to find thereon constitutes reversible error.

Lowe v. Pierce, 76 Cal. App. (2d) 316;

Hagge v. Drew, 73 Cal. App. (2d) 739.

ARGUMENT AS TO LIABILITY OF THIRD PARTY DEFENDANT.

We have thus far been considering the judgment in favor of plaintiff. If a liability does exist (which we earnestly contend is not the fact) from defendants to plaintiff, then that liability could only have arisen by wrongful and unauthorized action by Bayly, Martin & Fay. The third party complaint asserts a right of defendant to judgment against Bayly, Martin & Fay for any amount for which defendants may be held liable to plaintiff. The trial Court, although finding in favor of plaintiff, also found in favor of the third party defendant. From this judgment defendants have also appealed.

The following facts are admitted or are uncontradicted:

1. Defendants never authorized Bayly, Martin & Fay to accept insurance policies bearing a 2.20 rate of premium and Bayly, Martin & Fay knew it had no such authorization.

2. Bayly, Martin & Fay received the policies on October 1st or 2nd, 1946 and retained them in its possession until October 22, 1947.

3. When delivering the binder to defendants Bayly, Martin & Fay represented in writing that the binder would constitute defendants' insurance coverage, pending renewal.

4. When receiving a copy of plaintiff's audit (Exhibit 13) about April 19, 1947, indicating a demand for additional premium, Bayly, Martin &

Fay did not notify the defendants. It deliberately concealed the fact of such demand until October 22, 1947.

IF BAYLY, MARTIN & FAY ACCEPTED ON BEHALF OF DEFENDANTS POLICIES CALLING FOR A 2.20 GUARANTEED RATE OF PREMIUM, IT WAS WITHOUT AUTHORIZATION.

If these policies were accepted, it could only have been by act of Bayly, Martin & Fay. All of the negotiations were between plaintiff and Bayly, Martin & Fay. There were absolutely no communications between defendants and plaintiff. The policies were delivered to Bayly, Martin & Fay and it retained possession of them.

If Bayly, Martin & Fay was not authorized to accept policies bearing a guaranteed 2.20 rate of premium, then its acceptance of them on behalf of defendants was a breach of duty for which it is liable.

Cantlen knew that he had no right to accept a policy with a guaranteed rate of premium unless defendants agreed to such rate:

> "A. I explained to Mr. Coughlin that Fidelity & Casualty Company still were insisting upon the retrospective plan of insurance and that I was still unsuccessful in having them consider a guaranteed cost plan, and that we were continuing to attempt to secure or locate another market to offer to him, and continue our efforts with Fidelity & Casualty Company to have them reconsider the writing of it on a guaranteed cost plan, the rate to be agreed upon." (Tr. p. 242.)

Bayly, Martin & Fay had acted as broker for defendants since 1941, and in all instances defendants' approval was obtained before any policy of insurance was accepted. (Tr. pp. 306-308.)

It is undisputed that defendants did not agree to accept a policy with a 2.20 rate and that Cantlen knew that defendants would not accept such a rate.

> "Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of $2.20 as compared with the rate of 1.223, which he had been paying?
>
> A. No, he did not." (Tr. p. 272.)

Cantlen dictated Exhibit 18, the letter of defendants to Bayly, Martin & Fay denying liability.

> "Q. I call your attention to this statement: 'At no time did we agree to a rate of $2.20 as against our former rate of 1.223'. Did you draft that statement?
>
> A. That is true.
>
> Q. Is that statement true?
>
> A. Yes." (Tr. p. 279.)

The rate of 2.20 was never even mentioned to Coughlin.

> "Q. So that, although the exact amount of $2.20 was never mentioned, there was conversation about the rate increase?
>
> A. Correct." (Tr. p. 294.)

The most conclusive testimony that defendants never agreed to a 2.20 rate, and that Cantlen knew that they had not so agreed, is the following:

"Q. Did you have any subsequent conversations with Mr. Coughlin on this matter, that is, in the next few days, before the cancellation?

A. Yes, on, I would say, the 17th of January, or the 16th, I had a further meeting with Mr. Mettalia, and I asked him if he thought that *if I could get a firm order from the assured for a guaranteed cost plan at a rate*, would he submit it to New York for their approval. * * * Mr. Mettalia told me he would submit it, but he held little, if any, hope that they would consider it. I then went to Mr. Coughlin's office and asked him if he would give me a firm order at a rate of 1.75, that I would like to submit it on the firm basis to Fidelity & Casualty Company, and at that time he told me that he had subscribed or entered into the agreement with the Transport Insurance Exchange and they were to take over the insurance as of the effective date of the cancellation of the Fidelity & Casualty Company." (Tr. p. 335.)

In other words, on January 16th or 17th, 1947, Cantlen was trying to get Coughlin to submit a firm order of a 1.75 guaranteed rate. It is perfectly obvious

1. That Cantlen knew that he had to have express authorization or order before he could submit any proposition on behalf of defendants;

2. No prior authorization or order at any rate had been received by him.

If Bayly, Martin & Fay accepted these policies, it did so without authority, was guilty of a clear breach of duty, and is responsible for such damages as its unauthorized action caused its principal.

"If a broker performs unauthorized acts, in the course of his agency, he is liable to his principal for the loss or damage which results therefrom".

12 *C.J.S.* p. 94;

L. Reed Mfg. Co. v. Worts, 187 Ill. 378, 385.

THE RETENTION OF THE POLICIES WAS A BREACH OF DUTY BOTH AT COMMON LAW AND ACCORDING TO STATUTE.

If these policies were effective, it was the broker's positive duty to deliver them to the assured. In this it failed. Bayly, Martin & Fay held these policies from October 2, 1946 until October 22, 1947. It did not even show the policies to defendants. (Tr. pp. 243, 252, 253, 272.) Cantlen was not even sure he told defendants that he had received any policies. He "thinks" he told Coughlin he had received policies when he submitted to Coughlin the retrospective agreement. (Tr. p. 272.) This was positively denied by Coughlin.

"Q. Did Mr. Cantlen ever tell you he had any policy or policies in his possession that he had received from Fidelity & Casualty Company at the same time he received the retrospective agreement?

A. Not at that time, no, sir.

Q. Was the first time you heard of any policy the time Mr. Cantlen came out with the policies to the office on October 22, 1947?

A. It was either October or November when he came to see Mr. Davis, that is right.

Q. 1947, October or November?

A. That is right." (Tr. pp. 405-406.)

It is the practice of Bayly, Martin & Fay to deliver the policies to the insured as soon as they are issued and checked. (Tr. p. 273.) In the case of defendants, it had previously been the practice of Bayly, Martin & Fay to send the renewal policy before the existing policy expired. (Tr. p. 341.)

Section 383.5 of the Insurance Code of California provides as follows:

> "(*Delivery.*) The original or a true copy of such document shall be delivered to each owner. Where it is executed by an insurer, the insurer shall deliver the original or a true copy:
>
> (a) To the agent or broker who negotiated the insurance, for delivery to each owner of the motor vehicle, or
>
> (b) To each owner of the motor vehicle.
>
> The agent or broker receiving such original or copy shall deliver one to each owner. * * *
>
> (*Violation of section.*) The licenses of any agent or broker found by the commissioner after hearing to have violated this section may be suspended or revoked in accordance with the procedure provided in Section 1731, or the certificate of authority of any insurer found by the commissioner after hearing to have violated this section may be suspended or revoked in accordance with the procedure provided in Section 704.
>
> (*Purpose.*) The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of that purpose the commissioner may make reasonable rules and regulations therefor."

If these policies were accepted, it could only have been because Bayly, Martin & Fay, as the agent of defendants, retained possession of them and did not return them to plaintiff. If so, the retention of the policies by Bayly, Martin & Fay, and failure to deliver same to the defendants, was the direct cause of defendants' liability, and for the resulting loss the broker or agent is responsible.

BAYLY, MARTIN & FAY GUILTY OF CONCEALMENT.

The answer of third party defendant admits the duties of the agent to the principal; admits that it was the duty of said third party defendant as agent and broker of third party plaintiffs, to notify third party plaintiffs of the receipt and acceptance by third party defendant of said Policies SPL 20950 and SPL 20968 and to disclose to third party plaintiffs, as the principals of third party defendant, the fact of receipt and acceptance and particularly to notify said third party plaintiffs that said policies contain provisions for increased premium rate as specified hereinbefore, and to disclose said material fact to third party plaintiffs as the principals of third party defendant.

It is respectfully submitted that these duties were not complied with by third party defendant.

In addition to retention of the policies and failure to even show them to the insured, Bayly, Martin & Fay committed the following additional breaches of

duty and good faith. It failed to notify defendants when a demand was asserted by plaintiff for additional premium on or about April 19, 1947, and deliberately concealed from defendants the fact of such additional demand and claim until October 22, 1947. It collected premiums from defendants and failed to promptly remit same to the plaintiff. It definitely informed defendants that the binder would constitute its coverage "pending renewal" and thereby induced defendants to rely upon such information. It accepted monthly reports and remittances of premiums from defendants on the basis of the former policy, all without protest or objection, and thereby led defendants to believe and act upon the assumption that such was in fact the rate of premium.

MEMORANDUM OPINION OF THE TRIAL COURT.

We shall now advert to that portion of the Memorandum Opinion bearing upon the liability of third party defendant.

The trial Court failed to even consider the primary question: Did third party defendant accept the policies so as to make same binding upon defendants without authorization?

The Court states that because the binder recites that it is for sixty days, it is impossible to believe that defendants could have believed that the binder was in effect after that period. We wonder what insured, if given a binder by his broker and if told by

the broker that the binder delivered will constitute his policy and coverage pending negotiations for renewal, would read the binder to ascertain its terms and not depend upon the representations of his agent. If the insured did read the binder and did observe that it was written for sixty days, would he not leave the details of its extension to the agent and depend upon the agent to obtain necessary extensions? Certainly, an agent is not relieved of responsibility for a misrepresentation on the theory that his principal has the duty to read the document and thereby ascertain that his statement is false.

The Court states that defendants knew, or should have known, of the delivery of the policies to their agent. This is a remarkable statement. How could defendants have known? If the agent received policies, it was its positive legal duty to deliver them to the insured. Were defendants to presume that this duty had been violated and were they charged with the duty of exercising some mysterious power of intuition?

The Court states that "the documentary evidence and the circumstances show that defendants knew, or should have known, they were covered not by the binder, but by the policy." The Court ignores all of the undisputed evidence, which absolutely disproves such a conclusion: The written statement of the broker already referred to that the binder would constitute defendants' policy pending renewal; the information from the agent that plaintiff would only consider the issuance of renewal policies on a retrospective basis; the submission of the retrospective

agreement without any policy; the agent's statement that plaintiff positively refused to consider a guaranteed rate of premium; the repeated acceptance by third party defendant and plaintiff without protest or objection of premiums reported and paid at the rate of the former policy; the failure to receive or be shown any policies.

The following is what the Court points to in support of the conclusion that defendants knew or should have known that they were covered by these policies: The Court states that being experienced, Coughlin knew that he could not operate without insurance and therefore must have inquired and known that these policies had been issued. This is a *non sequitur*. Coughlin knew that he had to have insurance. He had to have insurance from September 1, 1946, and his agent told him that he had it. The defendants were covered by the binder and the listings with the Regulatory Bodies followed as a matter of course. The broker was responsible for, and attended to this. With absolutely nothing in the record to support such a conclusion, the Court assumes that Coughlin must have inquired and thereby learned something that it was the positive duty of the agent to fully disclose, and which it failed to disclose. It is suggested that if certain clues had been followed they would have led to a disclosure. The Court overlooks the fact that it is considering the liability of an agent for failure to make disclosure of vitally material facts to his principal. Certainly, an agent cannot be relieved of responsibility for breach of his obligations and duties, by

mere speculation that his principal had means of information if it pursued an inquiry. This is not a case of people dealing at arm's-length.

> "A party may rely on another's representations without respect to their nature as expressions of opinion and without investigating their truth. where the relation between the parties is confidential. * * * However, the general rule requiring the representee to exercise due diligence, and to avail himself of means of knowledge within reach, does not apply if a relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the truthworthiness of the other, and in such cases the latter is under a duty to make a full and truthful disclosure of all material facts and is liable for either misrepresentation or concealment."
>
> 37 *C.J.S.* 282, Sec. 35.

> "The contract between plaintiff and defendant created here the relation of principal and agent. * * * The case presented is not one where the parties are to be considered as dealing at arm's-length but one where, because of the existence of a confidential relation, neither party could, without incurring liability therefor, misrepresent to the other any condition which it was important for the other party to be advised of."
>
> *Vance v. Supreme Lodge of the Fraternal Brotherhood,* 15 Cal. App. 178, 183.

In the case of *Calmon v. Sarraille,* 142 Cal. 638, the relationship was also that of principal and agent.

> "The proposition of the appellant, that inasmuch as the contents of the instrument were open

> to the plaintiff equally as to Garnier, and that as they signed it without reading it or having it read to them, they are bound by its terms, is without merit. The case of *Hawkins v. Hawkins,* 50 Cal. 558, cited in support of this proposition, has no application. The rule there laid down is applicable when the parties to the transaction are dealing at arm's-length, but has no application where the relation of trust or confidence exists between them."

The Court next mentions the fact that defendants received a copy of Cantlen's letter to American Manganese Company. Again, the Court reasons that it was the duty of defendant to deduce and discover from a reference to a date of expiration of insurance in this copy of a letter to one of defendant's customers that policies that it had never seen were in force and binding upon it. The Court ignores the most reasonable testimony of defendants that copies of such letters when received were simply filed as a matter of course. The Court overlooks the fact that the agent had a positive and affirmative duty to disclose facts and deliver policies, and that the insured had a right to rely upon the agent performing those duties. The agent is not relieved of that responsibility by discovering clues by which the principal could have discovered that the agent violated its trust.

The Court next states "defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancellation date, even though some of the claims were not filed until after the defendants had in April, 1947, rejected plaintiff's

claim for premiums figured upon the rates fixed by the policies." Let us examine this statement: Having paid premiums until January 21, 1947, and plaintiff having accepted and retained such premiums, it necessarily follows that defendants would expect plaintiff to take care of claims arising during that period. The Court states that claims were presented "after the defendants had in April, 1947, rejected plaintiff's claim for premiums figured upon the rate fixed by the policies." The Court is referring to plaintiff's audit of April 19, 1947 (Exhibit 11), but the Court overlooks the fact that the copy of the audit showing the additional demand went to Bayly, Martin & Fay, and that Bayly, Martin & Fry deliberately withheld all information pertaining to it from defendants until October 22, 1947; overlooks the fact that upon its receipt Cantlen argued and contended with plaintiff that the demand was unjustified and that this controversy between Cantlen and plaintiff continued until July, 1947; overlooks the fact that Cantlen wrote a letter to defendants on August 7, 1947, advising of the demand and then held it until October 22, 1947.

On the basis of these facts, and none other, so far as there is any specification, the Court concludes that defendants should have known that these policies were issued, delivered and were effective; that they superseded the binder, and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled. We respectfully submit that there is not the slightest basis for such conclusion; there was no manner, without information from the agent, that defendants could

have known that the policies were issued, delivered or effective; no manner in which they could have known that the rates in the policies were controlling until a retrospective agreement was signed or the policies cancelled.

The Court completely ignores the fact that if these policies were accepted, they were accepted without authorization; that if they were effective the agent breached its positive duty in withholding the policies. These breaches cannot be neutralized or avoided by speculating that the principal had available clues by which to discover facts that the agent failed to disclose.

CONCLUSION.

It is respectfully submitted that these policies were never effective; they were issued conditionally and the condition was never fulfilled; there never was any agreement by which they were issued and accepted on a guaranteed basis and exclusive of the retrospective agreement. It is further submitted that if the policies were effective, they could only have become so, by reason of unauthorized acts of Bayly, Martin & Fay, for which the third party defendant is responsible.

Dated, San Francisco, California,
January 29, 1951.

Respectfully submitted,
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